84-325

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT

v.

COMMONWEALTH OF MASSACHUSETTS

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

JAY GREENFIELD
(Counsel of Record)
PETER BUSCEMI
MARTHA A. GEER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
A partnership including
professional corporations
345 Park Avenue
New York, New York 10154
(212) 644-8000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a state statute that requires insured employee benefit plans to provide specified minimum benefits for certain kinds of medical services is preempted by Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a).*

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* Metropolitan Life Insurance Company and the Travelers Insurance Company were the appellants in the Supreme Judicial Court of Massachusetts. Travelers will also docket an appeal to this Court and will discuss preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Metropolitan joins in Travelers' arguments concerning the NLRA and incorporates them by reference in this jurisdictional statement.

In accordance with Rule 28.1 of the Rules of this Court, Metropolitan states that, other than wholly-owned subsidiaries, it has only one subsidiary in which it owns a controlling interest of more than 50%. That subsidiary is Dawn Water Company.

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JURISDICTIONAL STATEMENT

This case is already familiar to the Court. On July 6, 1983, the Court vacated the 1982 judgment of the Supreme Judicial Court of Massachusetts and remanded for reconsideration in light of *Shaw* v. *Delta Air Lines*, 103 S. Ct. 2890 (1983). In April 1984, a majority of the Supreme Judicial Court adhered to its earlier decision, notwithstanding the ruling in *Shaw* and this Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Accordingly, appellant once again seeks review here.

OPINIONS BELOW

The April 1984 opinion of the Supreme Judicial Court of Massachusetts (App. A, 1a-8a)[1] is reported at 391 Mass. 730 and 463 N.E.2d 548. The earlier opinion of

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[1] "App." refers to the separately bound appendix filed jointly in this Court by appellant and The Travelers Insurance Company.

that court (App. D, 13a-34a) is reported at 385 Mass. 598 and 433 N.E.2d 1223. The findings and conclusions of the state trial court (App. F, 36a-62a) are not reported. The trial court's opinion on appellee's motion for preliminary injunctive relief (App. I, 71a-84a) is not reported.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts (App. B, 9a) was entered on April 25, 1984. A notice of appeal to this Court (App. K, 93a-94a) was filed on May 29, 1984. On July 12, 1984, Justice Brennan extended the time for docketing the appeal to September 22, 1984 (Appendix, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATUTORY PROVISIONS INVOLVED

Section 47B of Massachusetts General Laws Chapter 175 and the relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, are reprinted in App. J, 85a-89a.

STATEMENT

In 1974, after extended study, Congress enacted the Employee Retirement Income Security Act ("ERISA") to protect the interests of participants in employee benefit plans and to enable such plans to be administered on a uniform, nationwide basis. To achieve these goals, Congress sought to occupy the regulatory field fully and thereby to eliminate the problems caused by diverse, patchwork state legislation. In Section 514(a) of ERISA, 29 U.S.C. 1144(a), Congress explicitly preempted all state laws that regulate, directly or indirectly, employee benefit plans covered by the federal statute. In unmistakable terms, Section 514(a) provides that the federal law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *."

In 1973, shortly before the enactment of ERISA, the Massachusetts legislature passed the "mandated benefit" statute at issue in this case. The state law, Section 47B of Massachusetts General Laws Chapter 175, requires, among other things, that employee health and welfare plans and insurance policies sold to such plans provide certain specified minimum benefits for the care of mental and nervous conditions.[2] Section 47B became effective on a mandatory basis on January 1, 1976.

Massachusetts has not sought to enforce Section 47B to the extent it applies directly to employee benefit plans. The Commonwealth concedes that ERISA precluded state legislatures from directly prescribing the nature and level of benefits that must be provided by plans covered by the federal law (App. F, 43a, 59a). But, the Commonwealth maintains, health insurance policies purchased by such plans must abide by the requirements of Section 47B and provide the specified coverage for mental and nervous conditions to plan beneficiaries residing in Massachusetts. Accordingly, in the Commonwealth's view, all insured employee health and welfare plans must offer the particular benefits mandated by the state legislature, even though ERISA bars the legislature from imposing that requirement directly on the plans themselves.

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[2] In particular, Section 47B requires that employee benefit plans and health insurance policies satisfy the following minimum requirements (App. J, 88a-89a):

> "(a) In the case of benefits based upon confinement as an inpatient in a mental hospital under the direction and supervision of the department of mental health, or in a private mental hospital licensed by the department of mental health, the period of confinement for which benefits shall be payable shall be at least sixty days in any calendar year.
>
> "(b) In the case of benefits based upon confinement as an inpatient in a licensed or accredited general hospital, such benefits shall be no different than for any other illness.
>
> "(c) In the case of outpatient benefits, these shall cover, to the extent of five hundred dollars over a twelve-month period, services furnished [by persons or institutions having certain specified qualifications]."

Both appellant Metropolitan Life Insurance Company and The Travelers Insurance Company have issued numerous health insurance policies to employee benefit plans.[3] Following the enactment of ERISA, Metropolitan and Travelers concluded that, in light of the preemption provision in the federal statute and the Supremacy Clause in Article VI of the federal Constitution, the mandatory feature of Section 47B could not properly be applied to employee benefit plans or to the health insurance policies they purchase. For this reason (among others), Metropolitan and Travelers did not modify certain of their employee benefit plan policies to include the minimum coverage required by Section 47B, and they continued to pay benefits under those policies in accordance with the plan and existing policy terms.

On June 1, 1979, the Commonwealth filed this action for declaratory and injunctive relief in the Superior Court for Suffolk County, Massachusetts. The Commonwealth sought (i) a declaration that Section 47B can validly be applied to insured ERISA plans and (ii) an injunction directing Metropolitan and Travelers to comply with the state statute. On the Commonwealth's motion, the trial court entered a preliminary injunction requiring defendants to provide the benefits mandated by Section 47B to Massachusetts residents covered by insurance policies issued or renewed by defendants after January 1, 1976 (App. I, 71a-84a).

At trial, defendants stressed that state mandated benefit statutes, such as Section 47B,

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[3] Among other ERISA plans covered by Metropolitan policies is General Electric Company's employee health insurance plan, which provides coverage to approximately one million persons nationwide. General Electric has, for many years, observed a uniform benefits policy for all plan members. A. 135-136. ("A." refers to the Appendix filed in the Supreme Judicial Court, together with the parties' opening briefs, in August 1981. A copy of the Appendix has been lodged with the Clerk of this Court.)

(i) make uniform ERISA plans covering employees in different states far more difficult to achieve;

(ii) significantly increase the cost of plan administration; and

(iii) force plan participants and plan sponsors to choose among (a) paying higher premiums to defray the additional cost of the new, mandated benefit; or (b) sacrificing other benefits that are already covered by the plan and that may well be more desirable than the mandated benefit; or (c) forgoing insurance altogether.

Defendants also observed that mandated benefit statutes improperly tend to encourage insured employee benefit plans to drop their insurance and become self-insurers. State statutes like Section 47B, when applied only to insured plans, ascribe significance to a distinction not drawn by Congress, *i.e.*, the distinction between insured and non-insured plans; they penalize insurance and thus threaten the financial security of ERISA plans.

Notwithstanding these arguments, the Superior Court sustained the validity of Section 47B and granted the injunction sought by the Commonwealth (App. F, 36a-62a). The court stated merely that Section 47B "is not preempted by * * * ERISA" (*id.* at 57a).

On direct appeal, the Supreme Judicial Court of Massachusetts affirmed (App. D, 13a-34a). The court noted that, in addition to the broad preemption provision in Section 514(a), ERISA also contains a "savings clause" for state insurance regulation (*id.* at 18a). Section 514(b)(2)(A) of the Act provides that nothing in the statute "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. 1144(b)(2)(A).[4]

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[4] Section 514(b)(2)(B), in turn, qualifies the savings clause. It states:

> Neither an employee benefit plan * * * nor any trust established under such a plan, shall be deemed to be an insurance

Although the Commonwealth argued that Section 47B "regulates insurance" and therefore is automatically exempt from ERISA preemption, the court was unwilling to adopt this simplistic contention. Indeed, the court stated (App. D, 21a):

> We are wary of such a literal reading, which might permit the State, through its insurance laws, to reach far into areas governed by ERISA, and thereby negate the unmistakable intent of Congress to work a broad preemption.

The court accepted the Commonwealth's argument only to the extent of acknowledging that "the language of the savings clause is broad enough to *permit* a construction that would exempt § 47B from preemption" (*id.* at 21a-22a; emphasis added).

As stated in its original decision, the Supreme Judicial Court's principal reason for upholding Section 47B was that the state law deals with the "substantive content" of employee benefits plans, not with the conduct of plan administrators. The court explained (App. D, 22a; citations and footnote omitted):

> Congress, when it enacted ERISA, was concerned with widespread abuses in plan administration, often resulting in employees' losses of anticipated benefits. In response, Congress enacted rules governing disclosure and fiduciary conduct by administrators of welfare benefit plans. Section 47B has no bearing on the problem of administrative abuse, and does not overlap or interfere with the means chosen by Congress to deal with such abuse. Section 47B affects only the substantive content of plans—a subject completely untouched by ERISA's regulatory provisions. Therefore, nothing in the practical relationship between the two statutes calls for an implied limitation on the phrase "regulates insurance" that would exclude § 47B from the protection of the savings clause.

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company or other insurer, * * * or to be engaged in the business of insurance * * * for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts * * *.

The court thus believed that questions of ERISA preemption ultimately can be determined only by considering the extent of actual practical conflict between federal and state law.

Metropolitan and Travelers appealed to this Court, contending that the Massachusetts court erred in permitting its preemption decision to turn on the asserted lack of conflict between Section 47B and the substantive regulations in ERISA. This Court vacated the judgment of the Massachusetts court (App. C, 10a-12a), and remanded for reconsideration in light of *Shaw* v. *Delta Air Lines*, 103 S. Ct. 2890 (1983). *Shaw* held that ERISA preemption is broad and does not depend on the existence of conflict between a state statute and federal regulatory provisions. 103 S. Ct. at 2900.

On remand, the Supreme Judicial Court adhered to its earlier decision and rationale (App. A, 1a-8a). The court acknowledged that this Court might reach a different result, but it "decline[d] to anticipate such a ruling" (*id.* at 4a). The state court refused to accept *Shaw*'s plain statement that the exceptions to ERISA preemption are "narrow." Instead, it labeled that aspect of the *Shaw* opinion "dictum" and sought to distinguish between the "exemption" from ERISA coverage considered in *Shaw* and the "exception" to ERISA preemption found in the insurance savings clause (*ibid.*).

The Massachusetts court conceded that this Court in *Shaw* rejected the argument that ERISA's broad preemption provision preempts only those state laws that actually conflict with ERISA's substantive regulations (App. A, 5a). Nevertheless, the state court held, such a "conflict-based analysis" is appropriate for interpreting the insurance savings clause (*ibid.*).

The Massachusetts court acknowledged *Shaw*'s holding that, in enacting ERISA, Congress intended to encourage uniform interstate employee benefit plans and therefore chose to preempt conflicting and inconsistent state and local regulations (App. A, 5a-6a). The court held, however, that this congressional intent "is inconsistent * * * with the broad language of the insurance exception" (*id.* at 6a). Accordingly, the court refused to change its earlier decision and expressly ruled that a state can "mandate employee benefits indirectly through its insurance laws" (*ibid.*).

Justice Wilkins dissented. He took the position that, under *Shaw*, the exceptions to ERISA preemption should be read narrowly, lest a multistate employer be denied the opportunity to maintain a uniform ERISA plan (App. A, 8a). Justice Wilkins concluded that Section 47B is not a law that "regulates insurance" within the meaning of ERISA's savings clause. Rather, the dissenting justice wrote, "Section 47B represents precisely that form of local intrusion on ERISA covered benefit plans that ERISA intends to prevent" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

This case presents an important question concerning the operation of employee health plans. A large number of states have now enacted statutes that require health insurance policies available to such plans to include particular benefits for particular medical conditions.[5] The

[5] At least 12 states, including Massachusetts, now have mandated benefit statutes like Section 47B, requiring coverage of mental health services. Colo. Rev. Stat. § 10-8-116(7) (Supp. 1983); Conn. Gen. Stat. Ann. § 38-174d (West Supp. 1984); Me. Rev. Stat. Ann. tit. 24-A, § 2843 (West Supp. 1983-1984); Md. Ann. Code art. 48A, § 477E (Michie Supp. 1983); Mass. Gen. Laws Ann. ch. 175, § 47B (West Supp. 1984-1985); Minn. Stat. Ann. § 62A.151 (West Supp. 1984); Mont. Code Ann. §§ 33-22-701 to -704 (1983); N.H. Rev. Stat. Ann. § 415:18-a (1983 & Supp. 1983); N.D. Cent. Code § 26-39-03 to -04 (1978); Ore. Rev. Stat. § 743.558 (as amended by 1983 Ore. Laws ch. 601, § 6); Va. Code § 38.1-348.7 (1981); Wis. Stat. Ann. § 632.89 (West 1980 & Supp. 1983-1984).

At least 20 states have statutes requiring that benefits be provided for the treatment of alcoholism and, in some instances, drug abuse. Conn. Gen. Stat. Ann. § 38-262b (West Supp. 1984); Ill. Ann. Stat. ch. 73 § 979(8) (Smith-Hurd Supp. 1984-1985); Ky. Rev. Stat. Ann. § 304.18-160 (1981); Me. Rev. Stat. Ann. tit. 24-A, § 2842 (West Supp. 1983-1984); Md. Ann. Code art. 48A, § 490F (Michie Supp. 1983); Mass. Gen. Laws Ann. ch. 175, § 110(H) (West Supp. 1984-1985); Mich. Comp. Laws Ann. §§ 500.3425, 500.3609a(2) (West 1983); Minn. Stat. Ann. § 62A.149 (West Supp. 1984); Miss. Code Ann. § 83-9-27 (Supp. 1983); Mo. Ann. Stat. § 376.779 (Vernon Supp. 1983); Mont. Code. Ann. §§ 33-22-701 to -704 (1983); Nev. Rev. Stat. §§ 689B.030, 689B.036 (1983); N.J. Stat. Ann. § 17B.27-46.1 (West 1984); N.D. Cent. Code § 26-39-03 to -04 (1978); Ohio Rev. Code Ann. § 3923.29 (Page Supp. 1983); Ore. Rev. Stat. § 743.557 (as amended by 1983 Ore. Laws ch. 601, § 5); R.I. Gen. Laws § 27-38-1 (Michie Supp. 1983); Va. Code § 38.1-348.7(A) (1981); Wash. Rev. Code Ann. §§ 48.21.170, 48.21.180 (West Supp. 1984-1985); Wis. Stat. Ann. § 632.89 (West 1980 & Supp. 1983-1984).

Other mandated benefit statutes concern home health care, reconstructive surgery, and various other medical services. See, *e.g.*, Ariz. Rev. Stat. Ann. § 20-1402(4)(b) (West Supp. 1983-1984) (home health care); Nev. Rev. Stat. § 689B.030(6) (1979) (hospice care); N.J. Stat. Ann. § 17B:27-46.1a (West 1984) (reconstructive surgery following mastectomy); Wis. Stat. Ann. § 632.895(4) (West Supp. 1983-1984) (inpatient and outpatient care for kidney disease).

number of employees and dependents potentially affected by such statutes is enormous. (As already noted, one ERISA plan alone, the General Electric plan, has approximately one million beneficiaries. See page 4, note 3, *supra*.) Mandated benefit statutes like Section 47B undercut one of the primary congressional purposes in enacting ERISA—encouraging uniformity of coverage in plans covering employees in several states. The compatibility of ERISA with such laws therefore is an issue that deserves the attention of this Court.

The decision of the Supreme Judicial Court is inconsistent with both of this Court's leading decisions on

ERISA preemption, *Shaw* v. *Delta Air Lines*, 103 S. Ct. 2890 (1983), and *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). These cases establish that ERISA's preemption provision is broad, that the exceptions to preemption are narrow, and that the states may not indirectly regulate the terms of an ERISA plan. The Massachusetts court has failed to apply these principles.

Shaw holds that the scope of ERISA preemption does not depend on the existence of an actual conflict between a state law and ERISA's substantive provisions. Notwithstanding this holding, and notwithstanding this Court's remand for reconsideration in light of *Shaw*, the Massachusetts court adhered to its earlier decision, insisting that the lack of any conflict with ERISA's substantive provisions precludes preemption of Section 47B.

The ruling below permits Massachusetts to achieve indirectly, through a purported regulation of insurance, a result that it could not achieve directly, namely, the prescribing of benefits that must be provided by insured ERISA plans. The decision thus runs directly counter to the holding in *Alessi*, which refused to allow the states to regulate ERISA plans indirectly, through legislation ostensibly intended for another purpose.

The Supreme Judicial Court declined to find Section 47B preempted, even though it recognized the "intimations in *Shaw*" that this Court "would reach a different result" (App. A, 4a). This Court should now grant review to correct the error of the Massachusetts court and establish the proper relationship between ERISA and state mandated benefit statutes.

A. ERISA Preemption is Broad and Does Not Depend on Conflict with ERISA's Substantive Provisions

Shaw stressed the breadth of ERISA's preemption of all state laws that "relate to" employee benefit plans. The Court observed that "[t]he breadth of § 514(a)'s pre-emptive reach is apparent from that section's lan-

guage" (103 S. Ct. at 2899-2900). Moreover, the Court said, the legislative history of Section 514(a) demonstrates that "Congress used the words 'relate to' * * * in their broad sense" (*id.* at 2900). The Court noted that the congressional conference committee that considered the bill that became ERISA deliberately broadened the bill's preemption provision to make clear that the provision's applicability is not limited to state laws relating to the specific subjects covered by ERISA. The committee's report "indicated that the section's preemptive scope was as broad as its language" (*id.* at 2901, citing H. R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 383 (1974)). In addition, as the Court recognized, the bill's sponsors in both the House and the Senate went out of their way to stress the importance and the breadth of ERISA's preemption provision. See 103 S. Ct. at 2901 and n.20, quoting 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent); *id.* at 29933 (remarks of Sen. Williams); *id.* at 29942 (remarks of Sen. Javits).

Shaw thus confirmed this Court's earlier conclusion in *Alessi* that Congress "meant to establish [employee benefit] plan regulation as exclusively a federal concern" (451 U.S. at 523). Congress sought to occupy the regulatory field fully and to leave no room for supplementary state regulation. See also, *e.g.*, *Azzaro* v. *Harnett*, 414 F. Supp. 473, 474 (S.D.N.Y. 1976), aff'd, 553 F.2d 93 (2d Cir.), cert. denied, 434 U.S. 824 (1977); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294, 1299-1300 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *National Carriers' Conference Committee* v. *Heffernan*, 454 F. Supp. 914, 917 (D. Conn. 1978). As Judge Newman has written,

> Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting, with certain specific exceptions, "all" state laws in-

> sofar as they "related" to plans covered by ERISA.
> * * *
>
> * * * § 514(a) preempts all state laws that relate to covered plans, whether the relation arises because a state law is specifically designed to affect such plans or because, as in this case, a state law of general application includes covered plans within its sweep.

Pervel Industries v. *Connecticut Commission on Human Rights and Opportunities*, 468 F. Supp. 490, 492 (D. Conn. 1978), aff'd, 603 F.2d 214 (2d Cir. 1979), cert. denied, 444 U.S. 1031 (1980).

Shaw recognized not only that ERISA preemption is broad but also that the exceptions to preemption are narrow. Quoting again the congressional sponsors of ERISA, the Court observed that "Congress applied the principle of pre-emption 'in its broadest sense to foreclose any non-Federal regulation of employee benefit plans,' creating *only very limited exceptions* to pre-emption" (103 S. Ct. at 2903, quoting 120 Cong. Rec. 29197 (remarks of Rep. Dent); emphasis added). Similarly, the Court referred to "the combination of Congress' enactment of an *all-inclusive pre-emption provision* and its enumeration of *narrow, specific exceptions* to that provision" (*ibid.*; emphasis added).

To be sure, *Shaw* was concerned directly with statutory provisions other than the insurance savings clause in Section 514(b)(2)(A) of ERISA.[6] But that does not mean, as the Massachusetts court asserted, that the Court's reference to the narrowness of the exceptions to

[6] In particular, *Shaw* construed Section 514(d) of ERISA, 29 U.S.C. 1144(d), which provides that nothing in the statute shall "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," and Section 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(3), which exempts from coverage under the federal law "any employee benefit plan * * * maintained solely for the purpose of complying with applicable * * * disability insurance laws."

ERISA preemption was dictum. Nor does it provide any justification for the Supreme Judicial Court's proposed distinction between "exemptions" from ERISA coverage and "exceptions" to ERISA preemption (App. A, 4a).

According to the Massachusetts court, the only exceptions to ERISA preemption are contained in Section 514(b), and this Court did not construe that provision in *Shaw* (App. A, 4A). Rather, the Massachusetts court said, this Court focused on the exemption from ERISA coverage in Section 4(b)(3) and the provision in Section 514(d) that preserves federal law. In the view of the Massachusetts court, neither of these provisions creates an exemption to ERISA preemption. The Supreme Judicial Court ruled that, although the "exemption" at issue in *Shaw* is to be construed narrowly, the "exceptions" provided by Section 514(b), including the insurance savings clause, are to be construed broadly.

The distinction proposed by the Massachusetts court is seriously flawed. Both "exemptions" from ERISA coverage and "exceptions" to ERISA preemption have the same effect; they define the limited areas of permissible state regulation of employee benefit plans. This Court in *Shaw* reviewed the entire statutory scheme and concluded that ERISA's broad preemption contemplates only a few narrow exceptions. 103 S. Ct. at 2899-2906. The Court specifically spoke in terms of "exceptions" (*id.* at 2899, 2902, 2903); it did not attach any significance to the semantic distinction pressed by the Massachusetts court.

This Court's analysis of the breadth of ERISA preemption and the narrowness of the exception to that preemption was an integral part of the reasoning that led to the Court's holding with respect to the New York Human Rights Law in *Shaw*. Far from dictum, the portions of the *Shaw* opinion quoted above represent this Court's definitive assessment of the interaction between ERISA's preemption provision and the limited number of qualifications created by Congress.

Shaw squarely holds that the preemption provision in Section 514(a) of ERISA cannot "be interpreted to preempt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like" (103 S. Ct. at 2900). As Justice Wilkins correctly wrote in dissent below, "Congress has adopted an all-inclusive preemption scheme, and it is now clear, in light of the *Shaw* opinion, that it is irrelevant whether State law dictating plan benefits conflicts with the substantive policies of ERISA" (App. A, 8a).

As Justice Wilkins recognized, the decision of the Massachusetts court cannot be reconciled with the holding in *Shaw*. The Massachusetts court incorrectly allowed its decision to be determined by the lack of any actual conflict between Section 47B and the substantive regulations of ERISA. That is not the appropriate inquiry under *Shaw*. It is no more proper where the insurance savings clause is involved than where other exceptions to ERISA preemption are at issue. Rather than looking for conflict with ERISA's regulatory provisions, the Massachusetts court should have focused on the effect of Section 47B, and of mandated benefit statutes generally, on insured ERISA plans.

The narrow exception in Section 514(b)(2)(A) for state laws regulating insurance was not intended to permit states to prescribe the benefits to be provided by insured ERISA plans. Congress chose both to occupy the regulatory field for ERISA plans and to leave to the plans' discretion the kinds of benefits to be provided. *Shaw* explicitly recognized that "ERISA does not mandate that employers provide any particular benefits" (103 S. Ct. at 2897). It would be inconsistent with this legislative choice to permit states, in the guise of regulating insurance, to dictate the benefits that insured ERISA plans must provide.

The savings clause for state laws regulating insurance was intended to permit states to continue their traditional function of regulating the solvency and business practices of insurance companies. It was never intended to authorize the states to undertake a kind of regulatory activity that Congress itself deliberately eschewed. *Michigan United Food & Commercial Workers Unions & Food Employers Health & Welfare Fund* v. *Baerwaldt*, 572 F. Supp. 943 (E.D. Mich. 1983), appeal docketed, No. 83-1570 (6th Cir. Aug. 16, 1983). (As we discuss in greater detail at pages 24-25, *infra*, such a construction gives vitality both to the savings clause and to ERISA's broad preemption of state law.)

B. In Disregard of this Court's Holding in *Alessi*, the Decision Below Would Permit States to Do Indirectly What They May Not Do Directly

Alessi held that ERISA's Section 514(a) is broad enough to preempt even state laws that do not directly regulate employee pension or welfare plans. In invalidating a New Jersey workers' compensation law, the Court said that "even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern" (451 U.S. at 525).[7]

Here, Massachusetts plainly intended to regulate the content of employee benefit plans. Materials prepared by the Massachusetts legislature in connection with Section 47B show that the statute's purpose was to make mental health care more readily available to all state residents, and to increase the revenues recoverable by the Commonwealth for that care. General Court Joint Committee on Insurance, *Advances in Health Insurance in Massachusetts* (August 1974), summarized in App. F, 52a-53a. The statutory provision governing health insurance policies was merely one means to that end; the Commonwealth was seeking to improve access to mental health care, not to regulate insurance.

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[7] The New Jersey statute at issue in *Alessi* prohibited the setoff of workers' compensation payments against employees' retirement pension benefits payable under ERISA plans.

Section 47B is addressed explicitly to employee benefit plans, not merely to insurance policies. ERISA, of course, compelled the Commonwealth to concede that Section 47B cannot be applied directly to employee benefit plans, but that does not change the fundamental character of the legislation. As the statutory language shows, Section 47B was intended to regulate the plans themselves.[8] By defending Section 47B now as an insurance statute, the Commonwealth seeks to justify state control over the

[8] In defending Section 47B as "a bona fide regulation of insurance," the Supreme Judicial Court asserted that "a large proportion" of the insurance policies to which the statute applies are unrelated to employee benefit plans (App. A, 7a). Even if the court's assertion was intended to refer solely to mere numbers of policies, it is not supported by the record. The parties stipulated and the trial court found that "[t]he preponderance of insurance policies affected by [Section 47B] have been issued to employers" (App. F, 43a).

If the court's remark was intended to refer to the far more meaningful criteria of number of persons covered, amount of premiums paid, and amount of benefits distributed, it is simply inaccurate. Measured by any of the latter criteria, group health insurance policies (principally policies sold to ERISA plans) far outweigh individual policies.

For calendar year 1981 (the latest year for which data are available), nationwide industry statistics show that nearly 116 million persons were covered by group "major medical" policies, while only 6.6 million persons were covered by individual "major medical" policies. The figures for basic hospital insurance and insurance for surgical and physician's expenses are comparable. Also in 1981, the total nationwide medical insurance premiums paid for group policies were approximately $37 billion; the total premiums paid for individual policies were only $4.7 billion. Similarly, the total benefits distributed under group medical policies in 1981 were more than $30 billion; the total benefits distributed under individual policies were under $3 billion. Health Insurance Association of America, *Source Book of Health Insurance Data* 14-27 (1982-1983). (A copy of this reference pamphlet has been lodged with the Clerk of the Court.)

There is no reason to believe that the relative significance of group and individual policies in Massachusetts varies substantially from the nationwide picture.

benefits provided by insured plans. The Commonwealth is thus trying to accomplish indirectly what it cannot accomplish directly. That is exactly what this Court refused to permit in *Alessi*.

If the position of the Massachusetts court were to prevail, the significance of ERISA's preemption provision would be drastically reduced, and the congressional intent underlying Section 514(a) would be defeated. By purporting to "regulate insurance," and thereby indirectly, but effectively, regulating employee benefit plans, states could achieve the very ends that Congress has foreclosed.

Indeed, with respect to insured plans, the Commonwealth's argument here means that the result reached in *Alessi* could actually be reversed through action by a state legislature. A state law could require that any insurance policy covering an employer's workers' compensation obligations contain a provision forbidding the offset of benefits payable under that policy against benefits due to an employee under a retirement or pension plan. Under the reasoning of the Supreme Judicial Court, such a state law would not be preempted by ERISA, even though it would accomplish precisely the result found unacceptable by this Court in *Alessi*.

Because Massachusetts cannot directly compel ERISA plans to provide specific health benefits—a point the Commonwealth concedes—it should not be permitted to achieve that result indirectly. As this Court wrote in *Alessi* (451 U.S. at 525), "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision."

C. Several Important Practical Considerations Militate Against the Result Reached Below

1. *Congress sought to encourage uniformity in multistate plans*

The legislative history of ERISA shows that Congress chose the broad preemption approach to foster uniformity and stability of employee benefit plans and to eliminate the threat of conflicting and inconsistent state regulation. For example, during floor debate in the House, Representative Dent, Chairman of the Subcommittee on Labor of the House Committee on Education and Labor, stated:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

120 Cong. Rec. 29197 (1974). Similar remarks were made during the Senate floor debate on ERISA. 120 Cong. Rec. 29933 (1974).

Shaw expressly confirms that Congress sought to encourage uniformity in the ERISA plans of multistate employers. In this Court's words, "[b]y establishing benefit plan regulation 'as exclusively a federal concern,' * * * Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees" (103 S. Ct. at 2904, quoting *Alessi* v. *Raybestos-Manhattan, Inc., supra*, 451 U.S. at 523). The Supreme Judicial Court noted this congressional intent but held that "[i]t is inconsistent * * * with the broad language of the insurance exception" (App. A, 6a). Accordingly, the Massachusetts court refused to find preemption even though it acknowledged that its decision would adversely affect the ability of multistate employers to maintain uniform ERISA plans.

If state statutes like Section 47B can compel the inclusion of particular benefits in insurance policies sold to ERISA plans, nationwide plans seeking uniformity will have only two alternatives: either give up insurance altogether or adopt a single national policy that, at vastly increased expense, provides for all employees the most generous of each of the mandated benefits required by one or more states (assuming, of course, that no such minimum requirements conflict with each other). One law review article has described this dilemma very well:

> If states are permitted to require employee benefit plans to provide substantive benefits under the guise of insurance regulation, the result may be a Hobson's choice for employer or labor and management negotiators: either abandon the funding of benefit plans through insurance policies or be willing to accept all-encompassing uniform national contracts. For if each state may impose its own substantive terms on the plan, the only way uniformity may be reached is by incorporating into the plan all of the benefits each state requires. This dilemma is clearly of the type that Congress sought to avoid by enacting ERISA's preemption provisions, which were formulated to relieve interstate employee benefit plans of the adverse effects of cumulative or inconsistent state regulation.

Hutchinson and Ifshin, *Federal Preemption of State Law Under the Employment Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 68-69 (1978).[9]

Shaw reached an identical conclusion in the context of the state fair employment laws that were directly at issue there. The extended discussion in note 25 of this Court's opinion closely parallels the academic comments reproduced above (*see* 103 S. Ct. at 2904 n.25). *Shaw* thus provides strong support for appellant's position in the

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[9] The Hutchinson and Ifshin article was cited with approval in this Court's opinion in *Shaw*. 103 S. Ct. at 2901 n.19.

present case. The Congress that tried to encourage uniformity could hardly have intended that the only means of accomplishing that end would be either self-insurance or comprehensive compliance with all the various and shifting positions of state legislatures that choose to enact mandated benefit laws.

If a multistate plan does not adopt one of the foregoing alternatives, Section 47B and other mandated benefit statutes will produce disparate treatment of employees covered by the same health plan, depending on the state in which they reside.[10] For example, an employer's insured health plan, covering employees at a single plant, some living in Massachusetts and some living in Rhode Island, would be required to provide minimum coverage for the treatment of the mental and nervous conditions of the Massachusetts residents, but no such coverage

[10] Like Section 47B, some mandated benefit statutes expressly provide that they govern all health insurance policies covering residents of a particular state, regardless of the state in which the policies are issued or delivered. See Md. Ann. Code art. 48A, §§ 477E, 477X (Michie Supp. 1983); N.H. Rev. Stat. Ann. § 415:18-a (1983 & Supp. 1983); R.I. Gen. Laws § 27-38-1 to -8 (Michie Supp. 1983).

Other statutes do not specify whether they are intended to reach policies issued and delivered outside the state. Statutes in this group, however, may be construed by state insurance departments to include all policies that cover state residents. See, *e.g.*, N.D. Ins. Dep't Bull. #21 (Sept. 2, 1975) (construing N.D. Cent. Code §§ 26-39-03 to -04 (1978)).

Wisconsin has enacted a hybrid statute that provides that any policy having a specified minimum connection with the state must comply with all the requirements of the Wisconsin Insurance Code, including its various mandated benefit statutes. Wis. Stat. Ann. § 600.01 (West 1980 & Supp. 1983-1984). The statute applies to any health insurance policy under which at least 25% of the persons insured are Wisconsin residents employed in Wisconsin.

As these different statutory schemes show, the decision of the court below would require multistate employers and their insurance carriers to adhere to a large number of state laws that vary widely in their substantive provisions.

would be required for the Rhode Island residents. For this reason, and contrary to ERISA's intent, mandated benefit statutes entail substantial administrative costs and produce unequal benefits for similarly situated employees of the same employer. These problems are particularly acute for employers with many employees whose jobs require them to move frequently from one state to another.

2. *By providing an incentive for self-insurance, the decision below threatens to diminish the financial security of employee benefit plans*

ERISA itself draws no distinction between insured and noninsured plans. On the contrary, Section 3(1) of the Act, 29 U.S.C. 1002(1), explicitly includes within the definition of "employee welfare benefit plan" plans that provide benefits "through the purchase of insurance or otherwise." Under the rationale followed in the court below, however, states may mandate the benefits provided by insured plans but may not mandate the benefits provided by noninsured plans. This is precisely what Massachusetts has done and what the Supreme Judicial Court has approved.

By imposing additional burdens on insured plans only, mandated benefit statutes provide an incentive for plans to forgo the purchase of insurance policies and to establish their own funds for the payment of employee claims. The more onerous the benefits mandated by state laws, the greater the incentive for employee health plans to forgo insurance. This will skew the financial support of employee benefit plans in a way never intended by Congress, and it will increase the possibility that individual plans will not have sufficient funds available to fulfill their obligations to sick or injured employees.[11]

[11] In fact, as mandated benefit statutes have proliferated, the number of self-insured employee benefit plans has grown dramatically. It is, at the least, a reasonable inference that mandated

Moreover, the incentive toward self-insurance tends irrationally to favor large employee plans over small. Large plans are the ones more likely to have the funds necessary to take advantage of the self-insurance option, while smaller plans will be forced to purchase insurance and thus to provide mandated benefits.

Nothing whatsoever in the language or legislative history of ERISA suggests that Congress intended to make the states' power to regulate the substantive content of employee benefit plans turn on the size of the plan, or the plan's willingness or capacity to be a self-insurer. These factors bear no rational relationship to the legislative concerns underlying ERISA. The distinction produced by the Commonwealth's application of Section 47B and endorsed by the decision below therefore is inappropriate.

3. *Mandated benefit statutes inevitably will force plan participants to pay higher premiums or to surrender other desirable benefits*

When a state compels an insured employee benefit plan to provide certain benefits, the state does not offer to pay any of the cost of those benefits. Rather, the expense must be borne by those whom the mandated benefit statute is purportedly designed to help. Plan participants can pay for such new benefits in one of two ways. They can agree to increased premiums, or they can sacrifice one or more of the benefits already included in the plan

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benefit statutes have contributed to this trend. Uncontradicted testimony supporting this inference was given by three trial witnesses. A. 97, 179, 404.

The experience of appellant Metropolitan is instructive. In 1975, claims paid to beneficiaries of self-insured plans (for which Metropolitan provided only administrative services) amounted to approximately $20 million, or 1.2% of the total group health claims paid by Metropolitan during that year. By 1983, the annual dollar figure for self-insured plans administered by Metropolitan had grown to more than $740 million, and these claims represented 15.2% of all group health claims paid by the company.

in order to compensate for the mandated benefit. In either event, the state legislature will have improperly imposed its will on the plan and its members. In either event, employees' reasonable expectations regarding the costs and benefits associated with the plan will have been disappointed. (See, for example, the trial testimony of James M. Dawson, the administrator of several union health and welfare funds, describing the dissatisfaction of employees who were forced to sacrifice their existing coverage for eyeglasses and dental care to pay for the different benefits required by a state mandated benefit statute. A. 86-87.) ERISA's preemption provision was designed to eliminate precisely this kind of state regulation of employee benefit plans.

D. The Proper Reading of the Insurance Savings Clause

Three possible interpretations of the insurance savings clause have been proposed in this case.

First, the Commonwealth has argued that, because Section 47B purports to regulate insurance, it is automatically protected from preemption by the savings clause. This approach, which was followed by the First Circuit prior to the decision in *Alessi*,[12] was rejected by the Supreme Judicial Court in its earlier decision (App. D, 21a-22a) and was not even mentioned in the opinion on remand. It is a simplistic, mechanical approach that would permit the states to engage in virtually unlimited regulation of ERISA plans, as long as they couched their actions in terms of insurance regulation.

Second, the Supreme Judicial Court has held that a state law purporting to regulate insurance will not be preempted unless it conflicts with ERISA's substantive

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[12] See *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978). See also *Metropolitan Life Insurance Co.* v. *Whaland*, 119 N.H. 894, 410 A.2d 635 (1979); *Insurance Commissioner* v. *Metropolitan Life Insurance Co.*, 296 Md. 334, 463 A.2d 793 (1983).

provisions. Presumably, the court would find preemption where there is such a direct conflict. As we have shown, this approach is inconsistent with the breadth of ERISA's preemption provision, with the congressional intent to preclude state intrusions into the content of ERISA plans, and with the holdings and rationale of *Shaw* and *Alessi*.

Third, Metropolitan and Travelers have advocated an interpretation of the savings clause that gives full effect to the language of that clause, without surrendering to the states the broad regulatory power over employee benefit plans that was denied them by the preemption clause. In appellant's view, the preemption and savings clauses can be sensibly reconciled by confining the latter to the traditional areas of state insurance regulation, such as the specification of standards of conduct in sales and advertising, the prescription of criteria governing investment of funds, and the requirement that adequate reserves be maintained. *Michigan United Food & Commercial Workers Union & Food Employers Health & Welfare Fund* v. *Baerwaldt*, *supra*, 572 F. Supp. at 950-952. This approach, which focuses on the kinds of insurance regulation in which the states have traditionally engaged, permits state regulation in the areas that Congress almost certainly had in mind when it enacted the insurance savings clause. It does so without significantly affecting the operation of ERISA plans.

We can be quite confident that Congress was not thinking of mandated benefit statutes when it enacted ERISA. As far as we have been able to determine, no such statute existed before 1971, and only four states enacted such laws before 1973, when the insurance savings clause first appeared in the bills that led to ERISA.[13] No

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[13] See Ariz. Rev. Stat. Ann. § 20-1402(4)(b) (West Supp. 1983-1984) (enacted in 1971); Conn. Gen. Stat. Ann. § 38-174d (West Supp. 1984) (enacted in 1971); Ill. Ann. Stat. ch. 73, § 979(7) (Smith-Hurd Supp. 1983-1984) (enacted in 1972); 1971 Wis. Laws ch. 325.

Three additional states passed mandated benefit statutes after the savings clause appeared in bill form but before ERISA became law. See, in addition to Section 47B, Md. Ann. Code art. 48A, § 477E (Michie Supp. 1983); Minn. Stat. Ann. § 62A.149 (West Supp. 1984).

legislative evidence whatever suggests that ERISA sought to preserve mandated benefit statutes or that Congress even knew about such statutes when it enacted the savings clause. That clause therefore should not be construed to include statutes like Section 47B.

Congress did not wish to have historic protections for insureds undermined by a wooden application of the preemption clause. At the same time, however, Congress could not have wished to have the preemption clause undermined by a wooden application of the savings clause. At the least, the preemption clause was designed to prevent the states from interfering with the relationship between ERISA plan sponsors and plan participants. To construe the savings clause so as to permit state regulation of that relationship—to construe it to permit a state to mandate the benefits that the plan must provide—would be to drain the meaning from ERISA's preemption provision.

For all these reasons, this Court should intervene in this case to establish the correct relationship between ERISA and state mandated benefit laws, to reconcile the conflict in the lower courts, and to forestall future adverse effects of such state statutes on employee benefit plans.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

JAY GREENFIELD
(Counsel of Record)
PETER BUSCEMI
MARTHA A. GEER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
A partnership including
professional corporations
345 Park Avenue
New York, New York 10154
(212) 644-8000

August 1984

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-18

METROPOLITAN LIFE INSURANCE COMPANY AND
THE TRAVELERS INSURANCE COMPANY, APPELLANTS,

v.

MASSACHUSETTS

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including September 22, 1984.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 12th
day of July, 1984.